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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EDWARD J. WILSMANN,
Petitioner,
vs
THE UPJOHN COMPANY
AND
HOMEMAKERS, INC.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Richard C. Walsh
Counsel of Record for Petitioner
Michigan I.D. No. P21948
WALSH, MILLER, RAYMAN & LANGELAND
133 West Cedar Street
Kalamazoo, Michigan 49007
Telephone: 616) 382-3690

QUESTIONS PRESENTED

I. Did the Appellate Court err when it reversed a Trial Court's denial of a Motion for Directed Verdict and Judgment Notwithstanding the Verdict by silently relying on dicta in *Anderson v City of Bessemer City, N C,*_____ *US*_____, 105 S Ct 1504 (1985)?

II. Do FELA and Jones Act decisions on the sufficiency of evidence to support a jury verdict apply to all federal jury trials?

III. Is the Appellate Court without power to vacate a jury verdict on the ground that one witness' testimony is deemed inconsistent where

a) the Appellate Court failed to consider substantiating testimony which supported the verdict without the benefit of the alleged inconsistent evidence;

b) the factual issues are first challenged on appeal; and

c) the appropriate standard of appellate review is not cited or used?

EDITOR'S NOTE

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the Order and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 24, 1985.

OPINIONS BELOW

The Decision of the court of appeals is reported at 775 F2d 713 (6th Cir, 1985) and is set out in the Appendix at A1-A20. The unpublished Order Denying Rehearing is set out at A22. The district court's opinion denying respondents' Motions for Judgment NOV or New Trial is reported at 583 F Supp 106 (W D Mich, 1984) and is in the Appendix at A27.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1985. A timely petition for rehearing and suggestion for rehearing en banc was filed, which was denied on January 20, 1986, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 USC §1254 (1).

STATUTE, RULES AND CONSTITUTIONAL PROVISION INVOLVED

Rule 50, Federal Rules of Civil Procedure provides:

> Rule 50. Motion For A Directed Verdict and for Judgment Notwithstanding the Verdict.
>
> (a) MOTION FOR DIRECTED VERDICT: WHEN MADE, EFFECT. . . . A motion for a directed verdict shall state the specific grounds therefor. . . .
>
> (b) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. Whenever a motion for a directed ve dict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and

any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(d) SAME: DENIAL OF MOTION. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Rule 38(a), Federal Rules of Civil Procedure states:

RULE 38. JURY TRIAL OF RIGHT.

(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Section 2072, 28 USC provides with regard to the Federal Rules of Civil Procedure:

> Such rules shall not abridge, enlarge, or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

The Seventh Amendment provides:

> In suits at comon law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

STATEMENT OF THE CASE

A. CIRCUMSTANCES OF THE TRANSACTION

Plaintiff/Petitioner, Edward J. Wilsmann ("Wilsmann") sold stock to Defendant/Respondent, The Upjohn Company ("Upjohn"), in reliance on oral promises of Upjohn. Several of Upjohn witnesses acknowledged that the oral promises were made and that Upjohn never had any intention of honoring the oral promises. A jury, properly instructed, found securities fraud under §10(b) of the Securitites Exchange Act of 1934 15 USC §78j (1981), and the Security and Exchange Commission's (SEC) Rule 10b-5, 17 CFR §240-10b-5 (1985).

At trial, both parties testified that on June 16, 1969, Wilsmann agree to sell 39 of his 45 shares of stock in Homemakers, Inc. to Upjohn as part of a proposed "B" type merger between the corporations. This was called the "front end".

The retained six shares were to be immediately converted to a 5.4% ownership interest in the surviving company and Upjohn was to have an option to purchase that interest on a set formula (20% of the profit for five years). Therefore, the exercise

of the option would produce the "back end" which was guaranteed to be equal to the "front end" stock exchange.

Wilsmann gave up another deal which was $800,000 better for him (on the front end) in order to accept the Upjohn deal.

In August, 1969, Upjohn stated that it could no longer give Wilsmann an interest in the surviving company because an interim loan from Upjohn to Homemakers had made the contemplated transaction illegal.

Thereafter, Upjohn structured and proposed an exchange of all of Wilsmann's 45 shares of stock but with an employment and bonus arrangement in place of the option agreement. The new formula (21.6% of the after tax operating and pre-bonus earnings less $12,150 for five years) was calculated to precisely equal the previous option price with adjustments for the efffect of turning in the six shares.

Wilsmann agreed to this new form only after receiving oral assurances from Upjohn that he would still be compensated for his stock according to the June 16th agreement and that subsequent writings changed only the form of the agreement, not the substance.

Originally on June 16th, Wilsmann had asked if there were no earnings, how would he get his "back end" payment? He was assured that the option would be extended until the true "back end" was there.

Wilsmann asked the same basic question in August, 1969. Again he was reassured. The employment contract would merely be extended until the true "back end" was there. The employment agreement was written with an automatic extension paragraph in it.

Immediately before closing the merger in November, 1969, Wilsmann was again assured that the deal had not changed from June 16th and that the minimum "back end" would be paid even if the contract had to be extended.

After five years, and sales of 69 million, Upjohn terminated Wilsmann's employment contract, informed him there had been no profits and calculated his "back end" payment at zero.

B. THE PROCEEDINGS BELOW

Wilsmannn commenced this action on June 27, 1977, alleging that the sale of his Homemakers stock was induced by fraudulent misrepresentations made orally by Upjohn. Violations are alleged of Section 10 (b) of the Securities Exchange Act of 1934, 15 USC 78j (b) (1981) and Rule 10b-5, 17 CFR 240.10b-5 (1985).

Prior to trial, Upjohn moved for summary judgment on Wilsmann's securities fraud claim. Upjohn argued that 1) Wilsmann failed to establish that a security was involved because 100% of the stock of Homemakers was sold triggering the "sale of business" doctrine, 2) that the statute of limitations barred Wilsmann's claims and 3) that laches barred his demand for rescission. The trial court denied the motion.

A jury trial commenced on June 7, 1983. After the close of Wilsmann's proofs, Upjohn moved for a directed verdict. With respect to Wilsmann's factual claim of Upjohn's misrepresentations Upjohn's motion made only one attack - failure to prove reliance on the representations. Upjohn never challenged proof of the other elements of Wilsmann's 10b-5 claim. It never challenged Wilsmann's claims of oral promises. Therefore, Wilsmann never responded at trial or prior to trial to such a challenge of the facts.

At the close of all the evidence, Upjohn renewed its motion for directed verdict without further argument. The trial court denied both Upjohn's original and renewed motions for directed verdict.

Following the jury's verdict in favor of Wilsmann, Upjohn moved for a new trial claiming 1) irrelevant and prejudicial testimony regarding the current value of Homemakers stock was heard by the jury and 2) that the statute of limitations defense was not presented to the jury.

Upjohn also moved in writing for a judgment nov. The only reasons stated were

1) Wilsmann's stock was not a security and therefore Wilsmann failed to state a federal cause of action; and

2) the statute of limitations barred Wilsmann's claims for relief.

Both motions were denied April 11, 1984.

Upjohn's post trial motions did not challenge Wilsmann's proof as insufficient to support a jury verdict. Again, Wilsmann did not respond to this issue during post trial proceedings and the trial court did not have the opportunity to rule on this issue.

Wilsmann appealed and Upjohn cross appealed raising for the first time the issue of sufficiency of the evidence. The appellate court rejected Upjohn's first reason for judgment nov and specifically elected not to rule on the second reason. Nevertheless, it stated that the motions for directed verdict and judgment nov should have been granted.

The appellate court ruled that the jury must have been confused about the fraud and held that Wilsmann's allegations were inconsistent. The fact that Upjohn testimony was consistent with Wilsmann's allegations was ignored by the appellate court. The judgment was vacated and the case remanded for the district court's decision to entertain Wilsmann's pendent state law claims without the grant of a new trial.

Wilsmann filed a petition for rehearing and suggestion for rehearing en banc. The motion was denied January 20, 1986.

REASONS FOR GRANTING THE WRIT

I. GRANTING THIS PETITION IS NECESSARY TO PRESERVE PETITIONER'S SEVENTH AMENDMEND RIGHT TO A JURY TRIAL AND TO PREVENT MANIFEST INJUSTICE WHERE THE APPELLATE COURT APPLIED THE WRONG STANDARD OF REVIEW IN VACATING PETITIONER'S JURY VERDICT.

In *Anderson v City of Bessemer City, N C,* _____ US _____, 105 S Ct 1504 (1985), this Court held that the "clearly erroneous" standard set forth in Rule 52 (a) was misapprehended

and misapplied by the court of appeals. This Court restated the rationale and confirmed the necessity for applying the "clearly erroneous" standard and presented to the lower courts general principles governing their exercise of power to overturn findings of the trier of fact.

Bessemer has been analyzed as requiring deference to a district court's findings where there are two reasonable interpretations of the evidence. Moore's *Federal Practice,* §52.03 (1) supplement to volume 5A, pp 112-114. It has not, however, been analyzed as setting forth a standard applicable for reviewing jury verdicts which fall within the ambit of the Seventh Amendment and the Federal Rules of Civil Procedure, Rule 50.

Apparently, the court of appeals in the instant case has delineated the application of *Bessemer* by borrowing dictum from *Bessemer* to vacate Wilsmann's jury verdict. Specifically this Court, in *Bessemer,* included the following dicta in its opinion on p 1512:

> This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; *or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it.* (Emphasis added).

In vacating the jury verdict, the appellate court in the instant case stated the following:

> Thus we conclude that the jury was left to sheet speculation with respect to the alleged fraud that Wilsmann claimed induced him to enter into this merger agreement. *A jury could not within reason find on this proof that Wilsmann had been a victim of fraud as he claimed. These contentions are at least to some degree*

> *mutually inconsistent and even conflicting.* It is impossible to tell which theory or contention or combination thereof, if any at all, was accepted by the jury. A directed verdict or judgment nov should have been granted to Upjohn. (Emphasis added) A20.

No other standard of review was stated or used by the appellate court.

The need for intervention by this Court in the present case is clear and compelling. The constitutionality of the standards and procedures for directed verdicts has been challenged as violative of the Seventh Amendment guarantee of a right to trial by jury and has been upheld as constitutionally acceptable. *Galloway v United States,* 319 US 372 (1943). The constitutionality of directed verdicts is dependent on adherence to these standards which serve to limit the power of the courts to invade the province of the jury.

The standards for granting a directed verdict are the same as those governing a motion for judgment nov. *Minten v Southern Railway Co,* 368 F2d 719 (6th Cir, 1966). These motions may be granted when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment. *Brady v Southern Railroad Co,* 320 US 476 (1943).

A recent appellate decision restated the standards as follows: After viewing the evidence in a light most favorable to the nonmoving party, a directed verdict or judgment nov will be granted only where 1) there is such a complete absence of evidence supporting the verdict that the jury's finding could only be the result of surmise and conjecture, or 2) there is such overwhelming evidence in favor of the movant that reasonable and fair minded men could not decide otherwise. *Aaron Ferer & Sons, Ltd v Chase Manhattan Bank,* 731 F2d 112 (2nd Cir, 1984).

Neither of these standards was applied in the present case or at least they were so misapplied and misapprehended as to be unrecognizable.

The appellate court failed to find an absence of evidence on any element of Wilsmann's claim. The court clearly indicated that

it had rejected that standard by the following statement found on page 14 of its opinion:

> We believe that, even if there were enough evidence here to be pieced together to support a verdict on one of Wilsmann's theories as to Upjohn's alleged promises, Wilsmann's very theories as to the content of the promises to him were in conflict, with the result that the jury was left to sheer speculation.

Nor did the appellate court cite overwhelming evidence in favor of the movant. Rather, the court applied *Bessemer, supra,* to enable itself to judge the plausibility of what it understood to be Wilsmann's contentions. For those present at the trial, the appellate opinion hardly resembles the case presented to the jury. The court focused on a portion of Wilsmann's testimony and ignored the remainder of the trial transcript.

Presented basically with a request by Upjohn to retry the facts of the case and a general argument closely resembling Upjohn's closing argument to the jury, the appellate court easily became confused.

For example, both Wilsmann and Upjohn's witness, Grant Young, testified that the timing of Wilsmann's "back end" payment was contingent upon earnings and could be extended beyond the five years originally planned. This is undisputed evidence yet the appellate court found this contingency to be inconsistent and even conflicting.

The appellate court has so deviated from its acceptable exercise of judicial powers that it has not only deprived Wilsmann of his right to a jury determination but has set a dangerous precedent in the Sixth Circuit requiring this Court's review of this case.

II. GRANTING THIS PETITION WILL PERMIT THE COURT TO RE-ESTABLISH THE IMPORTANCE OF FEDERAL RULE OF CIVIL PROCEDURE 50 WHICH IS FIRMLY GROUNDED IN PRINCIPLES OF FAIRNESS AND JUDICIAL EXPEDIENCE.

Upjohn failed to challenge the sufficiency of the evidence

at each stage of the district court proceedings. A motion for directed verdict was made after the close of Wilsmann's case which included an attack specifically on the sufficiency of the evidence as to Wilsmann's reliance on Upjohn's alleged misrepresentations. (A37). Upjohn did not restrict its appellate argument to the issue of reliance. In fact, on appeal it did not question Wilsmann's reliance and the appellate court did not address it. The issue first emerged in Upjohn's brief on appeal as a general argument that the evidence did not support the verdict, rather than a specific challenge to any one element of Wilsmann's 10b-5 claim.

This Court has clearly recognized that the power of federal appellate courts to reverse jury verdicts is limited where the losing party fails to properly challenge the sufficiency of the evidence at trial by motions for directed verdict and for judgment notwithstanding the verdict.

The issue was directly addressed in *Cone v West Virginia Pulp & Paper Co*, 330 US 212 (1947) and reaffirmed in *Johnson v New York, N H & H R Co*, 344 US 48 (1952). In *Cone*, this Court asked "whether a party's failure to make a motion in the district court for judgment notwithstanding the verdict, as permitted in Rule 50 (b), precludes an appellate court from directing entry of such a judgment." 330 US 215. This Court concluded that "In the absence of such a motion, we think the appellate court was without power to direct the district court to enter judgment contrary to the one it had permitted to stand." 330 US 218.

Cone firmly established the importance and fairness of presenting factual questions initially to the district court, who "has seen and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." Also see *Mosley v Cia Mar Andra S A*, 362 F2d 118 (2nd Cir), *cert den*, 385 US 933 (1966).

The lower courts, guided by the general principle that the federal rules are to be liberally construed have found compliance with the rule so long as the moving party has sufficiently apprised the trial court as to his position with respect to the motion.

A defendant was permitted to move for judgment nov despite his failure to move for directed verdict in *Splitt v Deltona Corp.*, 662 F2d 1142 (5th Cir, 1981). The court found defendant's objections to jury instructions gave adequate notice to all parties of the basis for defendant's concern.

In *Moran v Raymond Corp,* 484 F2d 1008 (1973), the seventh Circuit decided it could review the sufficiency of the evidence despite a very sketchy record of defendant's motion for directed verdict. If nothing else, Rule 50 requires notice at some point prior to appeal of the movant's defenses.

The reasons for the rule were stated in *Neely v Martin K Eby Construction Co,* 386 US 317 (1967):

> Part of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of the trial judge's first-hand knowledge of witnesses, testimony, and issues - because of his 'feel' for the overall case. These are very valid concerns to which the court of appeals should be constantly alert.
>
> Another reason for establishing the motion for directed verdict as a condition precedent to a motion for judgment nov is to avoid making a trap of the latter motion. At the time a motion for directed verdict is made, the party against whom the motion is directed still has an opportunity to cure the defects in proof that might otherwise preclude him from taking the case to the jury. A motion for judgment nov comes too late for the possibility of cure except by way of a complete new trial. The requirement of the motion for directed verdict is thus in keeping with the spirit of the rules to avoid tactical victories at the expense of substantive interests. 5A Moore's *Federal Practive,* §50.08, pp 50-76/77.

In the present case, the issue of sufficiency of the evidence was never presented to the trial court, not in a directed verdict motion, not in a renewal of that motion, nor in a motion for judgment nov. There was no notice of this specific Upjohn defense until the appellate level.

The injustice in permitting the decision in the present case to stand is further illustrated by the tactics employed by Upjohn on appeal.

At trial, Upjohn focused exclusively on its legal defenses to Wilsmann's 10b-5 claim. Upjohn argued strenuously that the sale of business doctrine required rejection of the 10b-5 claim. Also, Upjohn presented a statute of limitations defense for the court's decision on several occasions. These same two issues were the focus of their post trial motions.

Upjohn obviously did not consider raising a sufficiency of the evidence argument was warranted or had merit until it prepared its appeal. Even on appeal, Upjohn continued to focus on the issues presented in the trial motions, taking only five pages to present a very general sufficiency of the evidence argument and in so arguing conveniently failing to bring the substance of its motion for directed verdict and judgment nov to the Court's attention.

Wilsmann did point out in his appellate brief that Upjohn's motion for judgment nov contained only two issues, neither of which was sufficiency of the evidence.

Wilsmann's petition for rehearing detailed Upjohn's failure to comply with Rule 50(b). The appellate court's order denying the petition for rehearing simply stated that Wilsmann's arguments "were fully considered upon the original submission and decision of the case". (A22)

Wilsmann was clearly ambushed at the appellate level.

> It is only where a litigant has made a motion for a directed verdict that he may ask the court to enter judgment non obstante veredicto. It is only in this manner that the question may be re-examined as a question of law. To ask the court to enter a judgment, contrary to

> a general verdict of the jury where no motion for a directed verdict has been interposed, is simply to ask the court to re-examine the facts already tried by the jury, and this the court may not do without violating the Seventh Amendment. *Mutual Benefit Health & Accident Association v Thomas,* 123 F2d 353, (8th Cir, 1941).

Certiorari should be granted in the present case to remind the appellate courts that Rule 50(b) was adopted as a tool for effective and economical conduct in federal litigation. The present case provides an excellent format for re-emphasizing Rule 50(b) because Upjohn not only did not make a motion for judgment nov but failed to raise the issue in their motion for directed verdict. Permitting the court of appeals to outright reverse the jury verdict would be tantamount to overruling *Cone* and its followers and to commencing the demise of Rule 50(b).

III. GRANTING THIS PETITION WILL GIVE THIS COURT THE OPPORTUNITY TO FORMULATE GENERAL PRINCIPLES TO ASSIST FEDERAL COURTS IN THEIR REVIEW OF JURY VERDICTS.

Granting certiorari in the present case will allow this Court to address fundamental conceptual issues regarding the importance of a consistent standard for appellate review of jury verdicts in federal statutory actions.

The disagreement that currently exists in the circuits over the nature of proof required and the portion of evidence to be considered in reviewing federal jury cases has resulted in a serious abuse of federal judicial power over the jury's traditional function of trier of fact.

This case presents for the Court's consideration a standard of review which clearly requires only a portion of evidence to be reviewed by the appellate court and a nature of proof neither of a scintilla nor of a substantial amount but instead a determination of factual plausibility and consistency. As such, this case contains

the dimensions necessary for this Court to define general principles of review in civil jury cases.

The present case adds another important factual dimension to the issues presented in this petition. This case arises out of the federal securities law and as such is a statutory tort similar to FELA and Jones Act cases. This case provides an effective tool should this Court conclude that the standards of review applied in FELA and Jones Act cases should be extended to all statutory torts or all federal civil jury trials.

The decisions of this Court in specific statutory negligence actions such as FELA and Jones Act cases have set forth a restrictive view of the circumstances under which a case may be taken from the jury. *Atlantic & Gulf Stevedores, Inc v Ellerman Lines,* 369 US 355 (1962); *Wilkerson v McCarthy,* 336 US 53 (1949); *Rogers v Missouri Pacific Railroad Co,* 352 US 500 (1957).

In *Wilkerson, supra,* this Court held that on motions for directed verdict and judgment nov, the court should consider only the evidence and inferences which support the non movant's case. The nature of proof required for granting such motions was set forth in *Brady v Southern Railroad, supra.* A verdict may properly be directed when, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict. But where there is conflicting evidence, a directed verdict is improper.

Although this Court itself has cited these cases as representing the federal test of sufficiency of the evidence to support a jury verdict, the circuits are split as to whether these rules are confined to FELA and Jones Act cases. *Continental Ore Co v Union Carbide & Carbon Corp,* 370 US 690 (1962); *Tennant v Peoria & P U R Ry Co,* 321 US 29 (1944).

The Fifth, Second, Tenth and Seventh Circuits reject the FELA standards in non FELA cases. *Boeing Co v Shipman,* 411 F2d 365, 370-373 (5th Cir, 1969); *Gibson v Elgin, J & E R Co,* 246 F2d 834 (7th Cir), *cert den,* 355 US 897 (1957); *Cahill v New York, N H & H R Co,* 224 F2d 637, (2nd Cir, 1955); *Missouri - Kansas - Texas Ry Co v Hearson,* 422 F2d 1037 (10 cir, 1970).

The Fourth, Sixth, and Eighth Circuits apply the FELA standards as a general rule for federal review. *Wratchford v S J Groves & Sons Co,* 405 F2d 1061 (4th cir, 1969); *Lones v Detroit, T & I R Co,* 398 F2d 914 (6th Cir), *cert den,* 393 US 1063 (1968); *Continental Can Co v Horton,* 250 F2d 637 (8th Cir, 1957).

"A decision by the Supreme Court, clearly stating which view it takes as to the scope of the FELA and Jones Act decisions, would be of helpful guidance to the lower federal courts." 9 Wright and Miller, *Federal Civil Procedure,* §2526.

Coupled with the confusion over whether FELA cases set a uniform standard to be applied in jury cases is the great variety of verbal formulations among and within circuits of the federal standard of review generally recognized as sufficiency of the evidence. 9 Wright and Miller, *Federal Civil Procedure,* §2524.

In the instant case, the court of appeals formulated its own test and applied it to the testimony of one witness. The court failed to cite any of the substantiating testimony by Upjohn's witnesses. In effect, it focused on Wilsmann's testimony in a vacuum. The appellate court was able to do this by structuring the standard of review as it did. It failed to view that part of the record transmitted on appeal in a light most favorable to Wilsmann. Nor did the court seek to ferret out facts in support of the jury verdict.

Assuming arguendo the appellate court did cite the correct standard for reviewing jury determinations, it failed to properly apply that standard because it was applied only to Wilsmann's testimony. The appellate court did not state what portion of the evidence it was required to review in deciding the issues before it. But it is clear it did not consider all the evidence, or only such evidence that supports the non movant's case.

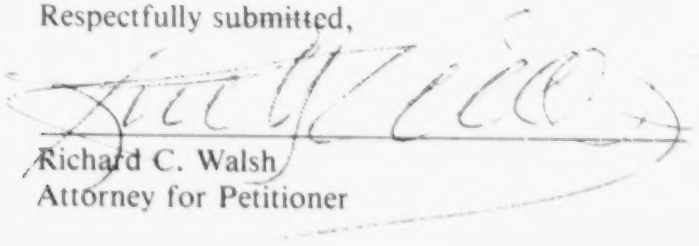
This case illustrates the opportunity for abuse in the federal appellate system where there is no consistently stated standard of review for civil jury trials. This Court cannot continue to ignore the erosion of the Seventh Amendment when the purpose of this Court is to protect and enforce the Constitution.

CONCLUSION

This petition presents an opportunity to remedy by summary disposition, vacating the appellate court's judgment and reinstating the jury verdict, or by full review of the Court a serious abuse of appellate discretion and in so doing bring certainty and predictability to the scope of federal law and procedure.

For these reasons and those discussed above, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,



Richard C. Walsh
Attorney for Petitioner

WALSH, MILLER, RAYMAN & LANGELAND
133 West Cedar Street
Kalamazoo, Michigan 49007
Telephone: (616) 382-3690

Dated: April 15, 1986

APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 84-1333 and 84-1334

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EDWARD J. WILSMANN,
Plaintiff-Appellant,
Cross-Appellee,

v.

UPJOHN CO. and UPJOHN HEALTH CARE SERVICES, INC.,
Defendant-Appellee,
Cross-Appellant.

ON APPEAL from the United States District Court for the Western District of Michigan.

Decided and Filed October 24, 1985

Before: JONES and WELLFORD, Circuit Judges, and BROWN, Senior Circuit Judge.

BAILEY BROWN, Senior Circuit Judge. In this case, which arises out of the merger of Homemakers, Inc. with the Upjohn Company (Upjohn) the jury found that Upjohn violated section 10(b) of the Securities Exchange Act of 1934 (34 Act), 15 U.S.C. § 78j (1981), and the Security and Exchange Commission's (SEC) Rule 10b-5, 17 C.F.R. § 240.10b-5 (1985), and awarded plaintiff Wilsmann, Homemakers president and a stockholder, $1,578,107.00 in damages.[1] Both Wilsmann and Upjohn have appealed.

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[1] These sections provide, in pertinent part:

15 U.S.C. § 78j. Manipulative and deceptive devices.

I

In 1969, appellant Wilsmann and two other men, Campbell[2] and Wunderlich, were the only shareholders of Homemakers, Inc.,[3] a small Illinois corporation that sold home health care franchises.[4] Wilsmann served as Homemakers' president and

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It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

§ 240.10b-5 **Employment of manipulative and deceptive devices**

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

[2]The same district judge decided the related case of *Campbell v. Upjohn Co.*, 498 F.Supp. 722 (W.D. Mich. 1980), *aff'd*, 676 F.2d 1122 (6th Cir. 1982). In *Campbell*, the plaintiff originally filed suit in the Connecticut state courts. The action was removed to the federal district court there and then transferred to the western district of Michigan. In *Campbell*, the district court held, and this court affirmed, that Campbell's claims of securities fraud were barred by the Connecticut statute of limitations.

[3]In 1969, 91 Homemakers shares were issued and outstanding. Wilsmann owned 45 shares of Homemakers stock, Wunderlich owned 35 shares, and Campbell owned 11 shares. In addition, 20 debentures that were convertible into 20 shares of Homemakers common stock were owned by various persons not involved here.

[4]Home health care includes the provision of temporary professional and paraprofessional nursing and housekeeping services in the home.

chief executive officer, and Campbell served as marketing director. In 1969, Homemakers, in need of working capital, entered into merger negotiations. In June of 1969, Homemakers decided to merge with Unicare, Inc., a corporation that operated a number of nursing homes. As part of the proposed merger, Unicare loaned $260,000 to Homemakers. Before the merger with Unicare was completed, however, Wilsmann learned that Upjohn might be interested in acquiring Homemakers. Wilsmann then stalled its merger with Unicare and entered into negotiations with Upjohn.

After several meetings and discussions, Homemakers and Upjohn tentatively agreed to a merger in which a new Homemakers, to be formed under Delaware law, would become an Upjohn subsidiary via a stock-for-stock exchange. The proposed merger agreement was reduced to a letter of intent prepared by Upjohn on June 19, 1969 which Wilsmann signed for Homemakers. It expressly did not bind either side. Under the terms of this letter of intent, Upjohn would exchange 225 shares of its stock for each share of Homemakers,[5] and Upjohn also would redeem the debentures at $12,500 each. This letter of intent also provided that at the conclusion of the acquisition, Wilsmann and Campbell each would have a 5.4 percent stock interest in the new Homemakers subsidiary.[6] In addition, this letter of intent provided that Upjohn would have an option to purchase these 5.4 percent stock interests at the end of five years for an amount equal to twenty times the average annual earnings per share of new Homemakers over the preceding five years. It was contemplated that both Wilsmann and Campbell would become key employees of the new Homemakers and that

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[5]Upjohn stock was then valued at approximately $45 per share. Thus Upjohn stock worth $10,125 (225 x $45) would be exchanged for each share of old Homemakers stock.

[6]Although not specifically set out in the June 19, 1969, letter of intent, it is agreed that it was mutually understood that Wilsmann and Campbell would each surrender six of their old Homemakers shares, not for Upjohn stock, but for a 5.4% interest in the new Homemakers to be formed.

its profits would be greatly affected by their performance. Wunderlich would not retain any interest in the new corporation.

Although the letter of intent clearly provided that Upjohn would have an *option* to purchase Wilsmann's and Campbell's shares in new Homemakers *for a price based on earnings*, Wilsmann contends that the actual agreement was dramatically different. According to Wilsmann, Upjohn officials at that time orally promised that Wilsmann and Campbell, but not Wunderlich, in order that Wilsmann and Campbell would receive the "true value" of all of their old Homemakers stock, be paid a "back end" payment of Upjohn stock in exchange for their new Homemakers stock equal to the *total* "front end" payment of Upjohn stock distributed to all three. Specifically, Wilsmann contends that Upjohn orally promised that he and Campbell would receive a total of 17,775 shares[7] of Upjohn stock tax free at the end of five years in exchange for their 5.4 percent interests in new Homemakers to be divided equally. App. 285-86. Wilsmann contends that this "back end" payment was reflected in the letter of intent, not as we have just described and as the parties had orally agreed, but as the five year "earn out" by the option to purchase their new Homemakers stock for an amount based on its earnings. This "earn out" provision was placed in the letter of intent rather than the oral agreement, Wilsmann contends, because it was believed that Wunderlich, an elderly man and an investor, had not contributed anything to Homemakers except his small initial investment and therefore should not be a minority stockholder in new Homemakers and not participate in the "back end" payment. Wilsmann contends that, by incorporating the "back end" payment in the letter of intent as an "earn out" for him and Campbell, Wunderlich

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[7]The computation, *per* Wilsmann, was as follows: 91 issued shares of old Homemakers, less the 12 old Homemakers shares to be surrendered for new Homemakers shares by Wilsmann and Campbell, multiplied by 225, the "front end" exchange rate for Upjohn/Homemakers stock, 91–12=79 x 225= 17,775

would be prevented from obtaining any interest in the new Homemakers subsidiary and receiving any part of the "back end" payment of Upjohn stock to be distributed under the oral agreement. Wilsmann contends that Upjohn understood and indeed promoted this subterfuge.[8]

Under the terms of the letter of intent, as stated, Upjohn would have an option to acquire the interests of Wilsmann and Campbell in new Homemakers in 1975 for an amount based on earnings. Wilsmann claims that he expressed concern about the possibility that the subsidiary would not have any or sufficient earnings during the first five years, and Wilsmann maintains that an Upjohn official promised him that Upjohn would not exercise its option to exchange Upjohn shares for his interest in new Homemakers until a "back end" value equivalent to the "front end" had been achieved. App. 286.[9]

In addition to signing the letter of intent, on June 19, 1969, Upjohn loaned old Homemakers $264,550 to keep afloat, that is, to repay the Unicare loan and $25,000 to provide Homemakers with some working capital. Wilsmann admitted that old Homemakers was "broke" at that time, as indeed it was. App. 293. In return for the loan, Upjohn received promissory notes from old Homemakers, and Wilsmann and Campbell pledged their old Homemakers stock to Upjohn.

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[8]If, as Wilsmann contends, Wilsmann and Campbell were to receive the back end payment of Upjohn stock in order that they receive the "true value" of their interests in old Homemakers, it is difficult to see why Campbell would receive half of these Upjohn shares. It is, moreover, difficult to see why, if the purpose of this subterfuge was only to mislead Wunderlich, Wilsmann did not insist that this oral agreement, inconsistent with the letter of intent, be placed in writing in a side agreement. (Wilsmann was no neophyte, being a certified public accountant and having an M.B.A. degree from Northwestern University. He was 45 years of age at that time.) It goes without saying that, whether or not Wunderlich "deserved" to participate in the back end distribution of Upjohn stock, he, as the owner of old Homemakers stock, was legally entitled to the same rate of payment therefor as Wilsmann and Campbell.

[9]This version of the oral side agreement, it should be noted, is somewhat different from that which Wilsmann apparently relies on in this litigation.

A second letter of intent, which also expressly did not bind either side, was prepared and signed by the parties on August 11, 1969, because the loan from Upjohn to old Homemakers, Upjohn learned, necessitated a restructuring of the terms of the merger for tax purposes.[10] Like the June 19, 1969, letter of intent, the second letter of intent provided that Upjohn would merge with old Homemakers in a stock-for-stock exchange in which the old Homemakers shareholders would receive 225 Upjohn shares in return for each of their Homemakers shares. The second letter differed from the first in that *all* old Homemakers shares would be exchanged in the merger, and Wilsmann and Campbell would have no stock interest in the new Homemakers subsidiary. The exchange rate would be the same, i.e. 225 Upjohn shares for each share of old Homemakers stock. The second letter of intent further provided that at the conclusion of the merger, Wilsmann and Campbell would have entered into five year incentive employment agreements with Upjohn that provided for an annual bonus for each man equal to 21.6 percent of the after tax operating and prebonus earnings of the Homemakers subsidiary less $12,150.[11] Thereafter several drafts of a merger agreement were prepared, and the closing occurred on November 6, 1969. The final merger agreement, dated October 31, 1969, which contained the same provision for exchange of all old Homemakers stock for Upjohn stock as that contained in the second (August, 1969) letter of intent, and which also made reference to the employment agreements, contained an integration clause superseding and nullifying all other agreements to the contrary.

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[10]There is no dispute that, because of the loan by Upjohn to old Homemakers, the acquisition, as contemplated by the June, 1969 letter of intent, would not be tax free. The first plan of merger is referred to in the record as a "Type B" merger; the second plan is referred to as a "Type A" merger.

[11]Upjohn contends that this bonus arrangement set out in the August, 1969 letter of intent was an attempt to approximately replicate, with respect to money to be received by Wilsmann and Campbell, the prior arrangement whereby Upjohn would have had the option to purchase their stock in new Homemakers at a price based on profits.

At the time of the closing, Upjohn presented Wilsmann but not Campbell[12] with a separate employment agreement. Wilsmann's employment agreement, which also contained an integration clause, provided that Wilsmann would be employed by new Homemakers as president from the date of the merger until November 30, 1974. The agreement further provided that if neither new Homemakers nor Wilsmann gave the other written notice of a desire to terminate the agreement thirty days prior to the expiration of the five year period, then the agreement would continue in effect until either gave the other thirty days notice of termination. Under the terms of the agreement, Wilsmann would receive a basic annual salary of not less than $40,000. The agreement also provided a bonus payment for Wilsmann based on profits in substantially the same terms as those contained in the second (August, 1969) letter of intent.[13]

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[12]Campbell was not hired because he misrepresented his educational achievements. Campbell claims that immediately before the closing, Upjohn officials confronted him regarding the misrepresentations in his resume and told him that he could either resign from Homemakers before the merger or that he would be fired immediately after the merger. Campbell testified that he was so humiliated by Upjohn's actions that he signed a letter of resignation and the merger agreement without reading them. 676 F.2d at 1125.

[13]The compensation provision in the employment agreement provided as follows:

> 3. *Compensation*
>
> As compensation for the services and duties to be rendered by Wilsmann hereunder, Homemakers agrees to pay Wilsmann as follows:
>
> (a) A basic salary of not less than $40,000 per annum, payable in equal monthly installments, plus
>
> (b) In the event the earnings of Homemakers are sufficient as hereinafter set forth, a bonus shall be paid to Wilsmann for each of the five twelve-month periods commencing December 1, 1969, in an amount by which 21.6% of the Net Earnings of Homemakers exceeds $12,150. The said bonus, if due, shall be payable on the first day of the month of July following the expiration of the twelve-month period for which a bonus is due.
>
> (c) "Net Earnings" of Homemakers shall mean the Net Earnings after taxes of Homemakers or the appropriate portion of the Net Earnings

Although the second letter of intent and the formal merger document and employment agreement provided that Wilsmann was to receive Upjohn stock for his old Homemakers stock and was to receive a bonus for the first five years based on profits, Wilsmann contends, again, that the oral agreement was dramatically different. He agrees that he was to receive, as he did receive, 225 shares of Upjohn stock for each of his forty-five old Homemakers shares, a total of 10,125 shares, of a value of $455,625.[14] (Parenthetically, Upjohn shares split two for one in 1973 so Wilsmann then had 20,250 shares worth approximately $101 per share or a total of about $2,106,000. App. 419.) He contends, however, that as a "back end" payment under the oral agreement he and Campbell were together to receive, in cash, at the end of the five years an amount equal to the 1969 value of 17,775 shares of Upjohn stock or $799,875. This, however, Wilsmann contends, was to be the minimum; if the bonus formula called for a larger amount, they were to receive that. He further contends that since, under the original oral understanding, he and Campbell were to receive the 17,775

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after taxes of any corporation into which Homemakers shall have been merged or with which it shall have been consolidated for the filing of tax returns or to which it shall have sold all or substantially all of its assets, determined in accordance with generally accepted accounting principles promulgated by the American Insitute of Certified Public Accountants, Inc., applied in accordance with Upjohn's accounting practices, adjusted as follows:

(i) Eliminate the tax effect of any prior year's losses.

(ii) Eliminate the amount of the bonus, net of the income tax benefits applicable thereto, to be paid to Wilsmann pursuant to this Agreement.

In computing Net Earnings, interest on any loans made by Upjohn or any subsidiary of Homemakers shall be at a rate not in excess of 1% over the then applicable prime rate for preferred customers of First National City Bank, New York, New York.

(d) Wilsmann shall be entitled to the customary employee benefits of Homemakers during the term of this Agreement.

[14] It appears that, though for purposes of the merger Upjohn stock was given its June, 1969 value of $45 per share, by the time of the merger it was actually worth $48 per share so that Wilsmann received stock worth $486,000.

shares tax free, they would receive the $799,875 tax free—that is, enough would be added to pay the income taxes on such payment. Of course, as heretofore stated, Campbell was not hired, but Wilsmann contends that since, in 1973, Upjohn stock split two for one, he alone should have received at the end of five years the cash equivalent as of 1969 of 17,775 shares or $799,875. App. 310-15.

Under the terms of the second letter of intent, the merger document and the employment agreement, as stated, Wilsmann would be entitled for five years to a bonus based upon earnings and in accordance with a prescribed formula. Wilsmann contends that he "expressed concern that he would not receive 'true value' under the written terms of the merger and employment contract, but plaintiff was assured by The Upjohn Company that said contract would be extended until he received true value." App. 17.[15]

On July 31, 1974, in accordance with the terms of the employment agreement, Upjohn told Wilsmann that his employment contract with Homemakers would not be extended beyond December 31, 1974, but that he was performing satisfactorily and would be continued as an employee. Wilsmann remained an employee as Homemakers' president until he was fired on December 17, 1976, for alleged insubordination. During the five years in which the bonus provision was in effect, according to Upjohn's accountants, the Homemakers subsidiary incurred substantial losses. Upjohn, therefore, informed Wilsmann from time to time that he was not entitled to any employment bonuses.

II

Wilsmann filed an action against Upjohn and Homemakers on June 27, 1977. The complaint contained several counts,

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[15]This version of the second oral side agreement, it should be noted, is somewhat different from that which Wilsmann apparently relies on in this litigation.

including an antitrust count, but for present purposes it is only necessary to relate that he alleged fraud in violation of the Securities and Exchange Act (15 U.S.C. § 78j and Rule 10b-5 (17 C.F.R. § 240.10b-5)) promulgated thereunder and a claim under state law for breach of contract. The case was tried to a jury, and issues were submitted with respect to fraud under the federal statute and regulation and breach of contract under state law. The jury was instructed to consider the state law claim only if it found for the defendants on the federal law claim. The jury found for Wilsmann on the federal law claim, awarding him damages in the amount of $1,578,107. Accordingly, it did not render a verdict on the state law breach of contract claim. On motion for Wilsmann, the district court ordered payment of prejudgment interest of $970,000. The district court then denied defendants' motion for a new trial and judgment n.o.v. Both sides have appealed.

Wilsmann contends that the district court erred in its decision that Wilsmann, by arguing to the jury for money damages, had thereby made an election that barred his claim for rescission or rescissional damages. Wilsmann further contends that the district court erred in its charge to the jury on the measure of damages. Finally, Wilsmann contends that the district court erred in denying his motion to amend the complaint to allege common law fraud and for wrongful discharge under the doctrine of *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980).

Upjohn and Homemakers assert that the district court erred in not granting their motion for a judgment n.o.v. on the ground that Wilsmann's claim was not properly within the scope of the federal securities laws. They further assert that the motion for a judgment n.o.v. should have been granted on the ground that, in the light of the specific provisions in the documents executed by the parties, including the integration clauses, the position and background of the parties, and the essential implausibility of Wilsmann's contentions with respect to oral side agreements, a jury could not within reason find for Wils-

mann as it did. Upjohn and Homemakers further contend that the district court erred in failing to instruct the jury with respect to the applicable six year statute of limitations. Finally, Upjohn and Homemakers assert error in the refusal of the district court to receive evidence that the jury had actually awarded prejudgment interest as part of its verdict.

III

Upjohn and Homemakers contended in the district court and contended here that the federal securities law and regulation upon which Wilsmann relied do not apply because the transaction involved was a sale of a business. Without citing the authorities, we can state that the circuits (other than this one, which has not taken a position) were divided on the issue of whether the federal securities law did apply to the sale of a business. Since then, however, the Supreme Court has decided that this federal law does apply to the sale of a business. *Landreth Timber Co. v. Landreth*, 105 S.Ct. 2297 (1985) and *Gould v. Ruefenacht*, 105 S.Ct. 2308 (1985). Upjohn and Homemakers have conceded this point and therefore we need not deal further with it.

Upjohn and Homemakers also contend that the federal securities law does not apply here because, in economic reality, Wilsmann's complaint was that there was fraud involved in inducing him to enter into the employment contract and that there was a breach of such employment contract and that there is no fraud charged with respect to the Upjohn stock that Wilsmann received for his Homemakers stock.

On the contrary, Wilsmann's claim is that he sold his stock in old Homemakers to Upjohn for Upjohn stock and for promises made to him by Upjohn of cash and other benefits which Upjohn did not intend to keep; that is to say, he asserted a claim of promissory fraud with respect to his sale. Wilsmann's allegations as to promises by Upjohn that it did not intend to keep (some of which were heretofore set out) were these: that he would at the end of five years be paid an additional "back end"

payment for his stock, that the bonus period would be extended until the bonus paid would satisfy the "back end" obligation, that Upjohn detail men (pharmaceutical salesmen) in the field would be used to promote new Homemakers, that new Homemakers would incur no interest expense as a result of loans made to it by Upjohn, and that he would be employed for life.

In *Mansback v. Prescott, Ball & Turben*, 598 F.2d 1017 (6th Cir. 1979), this court, holding that § 10b and Rule 10b-5 should be liberally construed to effectuate the policies of the Act (*id.* at 1024), stated:

> As a general matter, however, private § 10(b)/Rule 10b-5 damage claims can be said to require: 1) the use of jurisdictional means 2) to implement a deceptive or manipulative practice (with the requisite scienter) 3) in connection with 4) the purchase or sale 5) of a security 6) causing 7) damages.

Id. at 1026.

The question here is whether the thrust of Wilsmann's claim is promissory fraud "in connection with" the purchase of Wilsmann's shares in old Homemakers.

In *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971), the Court (*per* Justice Douglas) held that the sale of securities involved there was covered by the federal securities laws because the seller "suffered an injury as a result of a deceptive practice *touching* its sale of securities as an investor." *Id.* at 12-13 (emphasis added).

The case that perhaps comes closest to supporting Upjohn's contention is *Chemical Bank v. Arthur Andersen*, 726 F.2d 930 (2d Cir. 1984), *cert. denied* 105 S.Ct. 253 (1984). In that case, a company pledged the stock of a subsidiary to secure loans, and the contention was that officers and the accounting firm of the borrower made fraudulent misrepresentations as to the financial condition of the borrower. There was no fraud alleged, however, with respect to the stock of the subsidiary that was

pledged. The question presented was whether this claim based on fraud with respect to the financial condition of the borrower could be maintained under the federal securities laws. The Second Circuit (*per* Friendly, J.) agreed with the plaintiff banks that the pledge of the subsidiary's stock was a purchase and sale of the stock within the meaning of the federal statute and regulation. The court, however, disagreed with the banks that it was sufficient, for application of the federal statute and regulation, that *but for* the pledge of the stock of the subsidiary, the loans would not have been made and held that the federal securities laws were not applicable. Judge Friendly agreed with Professor Loss that Justice Douglas's use of "touching" in *Bankers Life* was nothing more than the Justice's variation of "in connection with" as a matter of literary style. *Id.* at 942.

The case before us, however, is clearly distinguishable from *Chemical Bank*. Here it is Wilsmann's contention and testimony that the consideration for the sale of his old Homemakers stock to Upjohn was not only the Upjohn stock then received but also the false promises by Upjohn as to what he would receive later for his old Homemakers stock. The *Chemical Bank* decision might be applicable here if Wilsmann's contention were that the Upjohn stock received upon the surrender of his old Homemakers stock was all that he was promised for his stock and that he would not have sold his old Homemakers stock to Upjohn *but for* a false promise of life employment with a bonus.

Accordingly, we determine that Wilsmann's claim on the basis of which he received a jury verdict could be prosecuted under the federal law and regulation upon which he relied.

IV

As stated, Upjohn and Homemakers further contend that the district court erred in not granting a directed verdict and in not granting a judgment n.o.v. on the ground that there was not sufficient evidence to support a verdict based on alleged fraud and under the federal securities law and regulation.

We have concluded that Upjohn and Homemakers are correct in this contention. We believe that, even if there were enough evidence here to be pieced together to support a verdict on one of Wilsmann's theories as to Upjohn's alleged promises, Wilsmann's very theories as to the content of the promises to him were in conflict, with the result that the jury was left to sheer speculation. We will first deal with the problem created by the essential implausibility of Wilsmann's contentions and then demonstrate the conflict *inter se* in his testimony as to what the core agreement was between him and Upjohn.

As stated, in 1969 Wilsmann was forty-five years of age, a certified public accountant and held an M.B.A. degree from Northwestern. Although home health care was a valid concept, Homemakers was broke and could not go public for funds. It was absolutely necessary that Homemakers find funds to stay afloat, and a merger appeared to be the only course.

Under the terms of the first letter of intent of June, 1969, Wilsmann would, for his old Homemakers stock, get 8775 shares of Upjohn stock (39 x 225) worth $45 per share or $394,875. In addition, he would receive a 5.4 percent interest in new Homemakers, which shares Upjohn would have an option to purchase in five years at a price based on average earnings per share over five years. Wilsmann executed the letter of intent and did not contend that he did not understand it.

Nevertheless, Wilsmann contends that the foregoing was not the real understanding as to what he was to be paid for his 5.4 percent interest in new Homemakers. Wilsmann contends that, in order that he and Campbell would receive the "true value" of all their old Homemakers stock, in five years they would assuredly receive 17,775 shares of Upjohn stock to be divided equally. This figure was, according to Wilsmann, arrived at by multiplying the total number (91) of old Homemakers shares outstanding, reduced by the twelve shares that he and Campbell would exchange for the new Homemakers stock (79), by 225. Thus their "back end" payment would in part be a payment for Wunderlich's stock. There is, however,

no explanation as to why, if he and Campbell were to be paid the "true value" of their old Homemakers stock, Campbell would receive half of the 17,775 shares, and there is no apparent reason therefor since Wilsmann had forty-five shares and Campbell had only eleven. As a matter of fact, if Upjohn were obligated in five years, when Wilsmann and Campbell would surrender their 5.4 percent interests in new Homemakers, to pay them enough Upjohn stock to insure their receipt of the "true value" of their old Homemakers stock, there is no apparent reason why the formula should be reduced by the twelve shares to be surrendered for the 5.4 percent interest in new Homemakers so that the formula would have been 91 x 225 or 20,475 shares to be divided evenly by Wilsmann and Campbell.

Wilsmann contends that, under this June, 1969, oral side agreement, Wunderlich was to receive none of the "back end" payment of shares, and that the provision in the letter of intent for the option to purchase Wilsmann's and Campbell's shares in new Homemakers for a price based on earnings was placed there to mislead Wunderlich. Wilsmann attributes this alleged chicanery to Upjohn, contending that Upjohn insisted that if this subterfuge were not employed, Upjohn would also have to make a "back end" payment of Upjohn shares to Wunderlich. Wilsmann never explains, however, why, if Upjohn was willing to make a "back end" payment of 17,775 shares, equal to the total "front end" payment, in five years to compensate for the "true value" of old Homemakers, Upjohn would object to Wunderlich's receiving his pro rata share of this distribution. Nor does Wilsmann explain why he did not insist that this oral side agreement, of such great importance to him, be memorialized by a written side agreement. Apparently he considered asking Upjohn for what he called a "dresser drawer deal," i.e. a written side agreement, but did not do so. App. 295.[16]

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[16]It is noted that while Wilsmann attributes to Upjohn the claimed chicanery to cheat Wunderlich, Wilsmann, under his contention, participated therein even though Wunderlich was a stockholder in old Homemakers of which Wilsmann was president!

Wilsmann had another version of this oral side agreement which in part recognized the provision in the June, 1969 letter of intent and is somewhat different from the version that called for the payment to Wilsmann and Campbell of 17,775 shares at the end of five years in any event. It will be remembered that under the letter of intent Upjohn would have an option to purchase Wilsmann's and Campbell's 5.4 percent interests in new Homemakers at the end of five years for a price based on earnings of new Homemakers. Wilsmann contends that he raised the question of what would happen if new Homemakers' earnings were deficient. He contends that Upjohn's response was that it would "not exercise [its] option until the true value is there." App. 286-87. Under this version, it appears that Upjohn would not have an unqualified obligation to deliver 17,775 shares at the end of five years, and, instead, it would defer exercise of its option until the earnings of new Homemakers under the formula would support a distribution of 17,775 shares of Upjohn stock to Wilsmann and Campbell.

The second letter of intent of August, 1969 provided that Wilsmann, Campbell and Wunderlich would each receive 225 shares of Upjohn stock for each of their old Homemakers shares and Wilsmann and Campbell would be employed by Upjohn on a salary and bonus arrangement. Neither Wilsmann nor Campbell would receive any shares in new Homemakers. These were the actual terms of the formal merger and employment documents executed in November, 1969. Wilsmann received at that time 10,125 (45 x 225) shares of Upjohn stock at $45 (or $455,625) which was actually by then at $48 per share or $486,000. Wilsmann's employment agreement explicitly set out precisely how his bonus based on earnings was to be determined and even contained a specific provision as to the maximum rate of interest to be charged by Upjohn to the new Homemakers subsidiary.

Contrary to the integration clauses in the closing document effecting the merger and in Wilsmann's employment agreement, Wilsmann contends that there was, again, an oral side

agreement that conflicted with the foregoing documents. According to Wilsmann this was again done to mislead Wunderlich but there was no explanation as to why there was no written side agreement. In any case, Wilsmann contends that under this oral side agreement, instead of receiving 17,775 additional shares to be divided equally as under the first oral agreement, he and Campbell were to receive the cash equivalent of such shares, based on the 1969 value, tax free in five years, to be divided equally.[17] This payment would be made in order that they would receive the "true value" of their old Homemakers stock.

Wilsmann had another version of this second oral agreement which in part recognized the provisions in the August, 1969, letter of intent and in the merger document and employment agreement. It will be remembered that in the second letter of intent and in the merger document and employment agreement Wilsmann was to receive a bonus based on earnings of new Homemakers. Wilsmann contends that he "expressed concern that he would not receive the 'true value' under the written terms of the merger and employment contract, but plaintiff was assured by The Upjohn Company that said contract would be extended until plaintiff received the true value." App. 17. Thus his contention here was that he was guaranteed that the five year bonus agreement would be extended until he received the cash equivalent of the Upjohn shares originally promised. Under this version, it appears that Upjohn would not have an unqualified obligation to pay the cash equivalent of 17,775 shares at the end of five years and, instead, that it would continue the bonus arrangement until the earnings of new Homemakers would support a cash distribution equivalent to the 17,775 shares.

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[17]It should be noted, however, that Wilsmann also testified that no person ever told him that they would not get the 17,775 shares contemplated by the first oral side agreement. App. 734.

While the employment agreement expressly placed a limit on the interest rate that Upjohn could charge for loans to the new Homemakers subsidiary, Wilsmann contends that Upjohn orally agreed that it would not finance new Homemakers by interest-bearing loans to it and that, therefore, in making such loans consistent with the employment agreement, Upjohn thereby reduced the profits of new Homemakers and that this also was fraudulent conduct. Wilsmann also contends that Upjohn failed, contrary to its promise, to use its detail men in promoting new Homemakers, and although the written agreements contained no obligation to do so, he contends that this failure reduced the profits of new Homemakers and that this also constituted fraud. Moreover, the original complaint alleged that "The Upjohn Company impliedly represented that the successor Homemakers['] net earnings which determined Plaintiff's 'back-end' payment would be calculated in a reasonable and good faith manner." App. 20. Thereafter it alleged that the net earnings were not so calculated and the complaint sets out twelve particulars in which there was fraud in the calculation of net earnings. App. 20-22. These claims of fraud which allegedly improperly reduced the profits of new Homemakers were apparently in support of Wilsmann's alternative theory, viz, that his "back-end" cash payment for the old Homemakers stock would ultimately come to him under the bonus agreement.

At the request of the chairman of Upjohn, on June 10, 1975, Wilsmann submitted a lengthy memorandum to support his contention that he had not received that which he had been promised by Upjohn. This document contains a great number of complaints about the financing and operation of new Homemakers but contains no assertion that he had been promised a guaranteed "back end" payment for his old Homemakers stock. Wilsmann's reason for not including this, he testified, was that he had been requested by the chairman to omit it. App. 422.

Although Wilsmann alleged in his original complaint, by interlineation, that he had been employed "for life" (App. 22),

in an amendment to the complaint he alleged that his discharge was "a nullity" because he could only be discharged by the board of directors of Homemakers and that the board had taken no such action.[18]

To summarize, not only are Wilsmann's contentions totally implausible but they are also in conflict each with the other:

Wilsmann contends that at the time the parties executed the first letter of intent the oral agreement was that he and Campbell were to receive, in any event, at the end of five years, 17,775 additional shares of Upjohn stock to be divided evenly. But he also contends, partially recognizing the option provision in the letter, that Upjohn orally agreed that it would not exercise the option to purchase his and Campbell's interest in new Homemakers until the earnings were such as would entitle them to 17,775 shares of Upjohn.

Wilsmann contends that at the time the parties executed the second letter of intent, the merger document and employment agreement, that the oral agreement was that he and Campbell were to receive, in any event, at the end of five years, the cash equivalent of 17,775 shares, valued as of 1969, with an additional amount to cover their taxes. But he also contends, partially recognizing the bonus provision in the letter, the merger document and the employment agreement, that Upjohn orally agreed that the five year contract providing for the bonus would be extended until he received in bonus the cash equivalent of the Upjohn shares originally promised.

Thus we conclude that the jury was left to sheer speculation with respect to the alleged fraud that Wilsmann claimed induced him to enter into this merger agreement. A jury could not within reason find on this proof that Wilsmann had been

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[18]This contention that Upjohn had orally promised Wilsmann employment "for life" is in direct conflict with the employment agreement. We note that Wilsmann does not contend that the employment agreement with respect to his tenure was also a subterfuge to mislead Wunderlich.

a victim of fraud as he claimed. These contentions are at least to some degree mutually inconsistent and even conflicting. It is impossible to tell which theory or contention or combination thereof, if any at all, was accepted by the jury. A directed verdict or a judgment n.o.v. should have been granted to Upjohn. 9 Wright and Miller, Federal Practice & Procedure, § 2524.

V

As stated, Upjohn also contends that the district court erred in not charging the jury on Upjohn's statute of limitations defense and in effect directed a verdict on that issue. We note that Wilsmann's counsel also requested the district court to submit the statute of limitations issue to the jury. While this claim of error presents a close question, we need not decide it since we are vacating the judgment on another ground.

VI

On remand, it will be for the district court to determine whether it will continue to entertain the pendent claims under state law. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

The judgment of the district court is **VACATED** and the case is **REMANDED** for further proceedings consistent with this opinion.

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 84-1333/1334

EDWARD J. WILSMANN,

Plaintiff-Appellant,
Cross Appellee,

v.

Upjohn Company and Upjohn HealthCare Services, Inc.,

Defendants-Appellees,
Cross Appellants.

Before: JONES and WELLFORD, Circuit Judges; and BROWN, Senior Circuit Judge.

JUDGEMENT

ON APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby vacated and the case is remanded for further proceedings consistent with this opinion.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

/s/ _____
Clerk

Date of Entry: October 24, 1985
Issued as Mandate:
February 12, 1986
COSTS: NONE
Filing fee .....$
Printing .....$
Total .....$

A True Copy.
Attest:

/s/ _____
Deputy Clerk

Nos. 84-1333/34

Entered January 20, 1986

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EDWARD J. WILSMANN

Plaintiff-Appellant,
Cross-Appellee,

v. ORDER

UPJOHN CO. and UPJOHN HEALTH CARE SERVICES, INC.

Defendant-Appellee,
Cross-Appellant.

BEFORE: JONES and WELLFORD, Circuit Judges; and BROWN, Senior Circuit Judge.

The Court having received a petition for rehearing en banc and response thereto, and the petition and response having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing as well as the response thereto and petitioner's proposed reply and motion to reconsider order denying motion to file reply, and concludes that the issues raised by petitioner were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/S/

John P. Hehman, Clerk

Entered November 22, 1985

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case Nos. 84-1333 and 84-1334

EDWARD J. WILSMANN,
Plaintiff-Appellant,
Cross-Appellee,

vs.

UPJOHN CO. and
UPJOHN HEALTH CARE SERVICE, INC.
Defendants-Appellees,
Cross-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF MICHIGAN

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

WILLIAM H. BAUGHMAN, JR.
WESTON, HURD, FALLON, PAISLEY & HOWLEY
2500 Terminal Tower
Cleveland, Ohio 44113
216/241-6602

RICHARD C. WALSH
WALSH, MILLER, RAYMAN & LANGELAND
133 West Cedar Street
Kalamazoo, Michigan 49007
616/382-3690

Attorneys for Plaintiff-Appellant and
Cross-Appellee, Edward J. Wilsmann

WILSMANN v UPJOHN CO. File No. 84-1333 and 84-1334

11-22-85

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

Pursuant to Federal Rules of Appellate Procedure 35 and 40 and Sixth Circuit Rule 14, plaintiff-appellant and cross-appellee, Edward J. Wilsmann, petitions this Court for rehearing in Case Nos. 84-1333 and 84-1334, a panel decision having been entered in these cases on October 24, 1985, and suggests rehearing by the Court *in banc*.

REQUIRED STATEMENTS FOk REHEARING IN BANC

I express the belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the United States Court of Appeals for the Sixth Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court. *Bellamy v. Bradley*, 729 F.2d 416 (6th Cir. 1984); *O'Neill v. Kiledjian*, 511 F.2d 511 (6th Cir. 1975); *Rymer v. Davis*, 754 F.2d 198 (6th Cir. 1985), *vacated on other grounds*, 105 S.Ct. 3517 (1985); *Howard v. Kerr Glass Manufacturing Co.*, 699 F.2d 330 (6th Cir. 1983).

I express the belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. In reviewing the decision of a District Judge to submit a claim to the jury, may the Court of Appeals weigh the credibility of the witnesses who testified on behalf of the prevailing party and reverse a jury verdict on the basis that the testimony of those witnesses was "essentially implausible"?

2. May the Court of Appeals reverse a jury verdict on the ground that the appellee failed to support an element of his claim by sufficient evidence when the appellant failed to make that argument in the District Court by either a motion for directed verdict or a motion for judgment notwithstanding the verdict?

/S/

WILLIAM H. BAUGHMAN, JR.
Attorney of Record for Plaintiff-
Appellant and Cross-Appellee,
Edward J. Wilsmann

Entered October 21, 1983

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN - SOUTHERN DIVISION

EDWARD J. WILSMANN,
Plaintiff,

v. Case No.: K77 317 CA4

THE UPJOHN COMPANY
and
HOMEMAKERS, INC.
foreign corporations,
Defendants.

MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR NEW TRIAL

NOW COME Defendants, The Upjohn Company and Upjohn Health-Care Services, Inc., and move this court for a judgment notwithstanding the verdict pursuant to Federal Rule of Civil Procedure 50(b) and for a new trial pursuant to Federal Rule of Procedure 59(a) as follows:

I. Defendants are entitled to a judgment notwithstanding the verdict on the ground that the "stock" plaintiff sold to The Upjohn Company was not a "security" under the Securities Exchange Act of 1934 and, therefore, plaintiff failed to state a federal cause of action;

II. Defendants are entitled to a judgment notwithstanding the verdict on the ground that plaintiff did not file suit within the applicable limitation period;

III. Defendants are entitled to a new trial on the ground that the jury should have been permitted to consider defendants' statute of limitations defense;

IV. Defendants are entitled to a new trial on the ground that irrelevant and prejudicial testimony was presented to the jury.

This motion is based on the records, files and testimony presented in this case and the brief of Defendants filed in support hereof.

Dated: 21, October, 1983

Respectfully submitted,
BROWN, COLMAN &
DeMENT, P.C.

/S/
Thomas G. Parachini

/S/
Dirk J. Holkeboer

BUSINESS ADDRESS:
444 West Michigan Avenue
Kalamazoo, Michigan 49007
(616) 381-7030

Entered 4-11-84

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD J. WILSMANN,
Plaintiff,

v. File No. K77-317 CA

UPJOHN COMPANY, et al.,
Defendants. OPINION

This matter was tried to a jury over ten trial days. At the close of the proofs, and after due deliberation, the jury returned a verdict for the plaintiff in the amount of $1,578,107.00. Now before the Court is defendants' motion, pursuant to Rules 50 and 59, Fed. R. Civ. P., for judgment notwithstanding the verdict and new trial. For the reasons set out below, the motion is denied.

The legal standards to be applied on these motions are clear. In *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104-1105 (6th Cir. 1978) (citations omitted), the court stated:

> The issue raised by a motion for a judgemnt n.o.v. is whether there is sufficient evidence to raise a question of fact for the jury . . . This determination is one of law to be made by the trial court in the first instance . . . In determining whether the evidence is sufficient, the trial court may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor . . . If, after thus viewing the evidence, the trial court is of the opinion that it points so strongly in favor of the movant that reasonable minds could not come to a different conclusion, then the motion should be granted.

In contrast to testing the legal sufficiency of the evidence in a motion for judgment n.o.v., a motion for new trial "is confined almost entirely to the exercise of discretion on the part of the trial court." *Allied Chemical Corp. v. Daifion, Inc.*, 449 U.S. 33, 36 (1980). A new trial may be granted where the verdict rendered is contrary to the clear weight of the evidence, or excessive, or to prevent a miscarriage of justice. *Peacock v. Board of Regents*, 597 F.2d 163 (9th Cir. 1979). A new trial would also be warranted when a verdict is reached on account of bias, passion, prejudice, corruption or other improper motive. *King v. Ford Motor Co.*, 597 F.2d 436 (5th Cir. 1979). However, a trial court does not properly grant a new trial merely because it might have come to a result different from that reached by the jury. *Rios v. Empresa Lineas Maritimas Argentinas*, 575 F.2d 986 (1st Cir. 1978).

The defendants have asserted two grounds for each type of relief sought. They seek a j.n.o.v. on the grounds that the stock sold by the plaintiff was not a security within the meaning of the Securities Exchange Act of 1934 and that the action was barred by the statue of limitations. They seek a new trial on the grounds that the Court erred in not allowing the jury to decide the statute of limitations issue and in allowing irrelevant and prejudicial testimony to be presented to the jury.

The defendants' first argument in support of their motion for a judgment n.o.v. is that the transaction upon which the lawsuit was based did not involve "securities" within the meaning of the federal securities laws. *See, e.g.*, 15 U.S.C. §78c(a)(10). The defendants argue that the Court should apply the "economic realities test" to determine whether this transaction falls within the scope of the securities laws. *See United Housing Foundation v. Forman*, 421 U.S. 837, 848-51 (1975); *Union Planters National Bank v. Commerical Credit Business Loans*, 651 F.2d 1174, 1180-81 (6th Cir. 1981). More specifically, the defendants seek to have the Court apply the "sale of business doctrine," see *Fredericksen v. Poloway*, 637 F.2d 1147 (7th Cir. 1981), and hold that the transaction does not fall within the scope of the securities laws because Upjohn purchased all of the stock of Homemakers, including that stock owned by the plaintiff.

WILSMANN v UPJOHN CO. K77-317 CA4

Entered 4-11-84

In its opinion of February 9, 1983, this Court decided that the sale of business doctrine should not be applied. This decision was based on *Golden v. Garafalo*, 678 F.2d 1139 (2d Cir. 1982), in which the sale of business doctrine was rejected by the Second Circuit. The Court still is persuaded by the reasoning in *Golden*.

As the Second Circuit noted, 678 F2d at 1144, the economic realities test was applied in *Forman* as the second part of a two-part test. It was applied only after the Supreme Court determined that the instruments in question, although called "stock," did not possess the "characteristics traditionally associated with stock." 421 U.S. at 851. These characteristics include the right to receive dividends, negotiability, and whether the instruments can be pledged or hypothecated, confer voting rights in proportion with the number of shares owned, and appreciate in value. Only after these charcteristics were found not to be present did the Court apply the economic realities test. *Id.*

The Court is persuaded by the Second Circuit's reasoning in *Golden* regarding the significance of this two-part test:

> Having first determined that the shares were not stock, the Court went on to determine whether they were an "investment contract" and applied the three-pronged "economic reality" test of *(SEC v. W. J. Howey Co.*, 328 U.S. 293 (1945)). The actual analysis utilized in *Forman* therefore, is inconsistent with the sale of business doctrine. If "economic reality" is the universal jurisdictional test under the (Securities) Acts, no matter what the facial or legal character of the instrument, there was no need to examine whether the . . . shares were stock according to conventional criteria, since an affirmative answer would have been irrelevant. The doctrine thus seems to assume that a major part of the discussion in *Forman* was pointless.

678 F.2d at 1144. In the instant case, because, in the plaintiff's hands, the stock which was sold to Upjohn possessed all of the aforementioned characteristics, it was not necessary to proceed to the second step of the *Forman* analysis.

The Court also finds significant the fact that, in the leading cases dealing with the sale of business doctrine, the allegedly defrauded party was the purchaser of the "stock." *See Landreth Timber Co. v. Landreth*, __ F.2d __, No. 81-3446 (9th Cir. March 7, 1984); *Sutter v. Groen*, 687 F.2d 197 (7th Cir. 1982); *Fredericksen v. Poloway*, 637 F.2d 1147 (7th Cir. 1981). The Seventh Circuit itself noted this distinction in *McGrath v. Zenith Radio Corp.*, 651 F.2d 458 (7th Cir. 1981). In determining that the sale of business doctrine did not apply when a purchaser allegedly committed fraud in purchasing all of the stock of a company when the stock constituted "securities" in the hands of the sellers the court stated:

> To conclude otherwise would be to hold that a purchaser of corporate shares may deprive investors/sellers of the protections of the securities laws if it can arrange that all of the corporation's shares are purchased at one time. Whatever the breadth of language, clearly *Frederiksen* does not require such a result.

651 F.2d at 468 n.5. This reasoning is equally appropriate where three shareholders sell the stock as when a large number of shareholders sell their stock. For all of these reasons, the Court is of the opinion that this action properly was brought under the Securities Exchange Act of 1934.

The defendants also seek j.n.o.v., as well as a new trial, on the ground that the Court improperly ruled that the plaintiff's lawsuit was not time-barred as a matter of law. This ruling was based on the fact that the original agreement would not necessarily have been completed until the "back-end" payment was made. As the Court noted in its Opinion of October 28, 1980 in this matter, at 5, "[n]o bonus payment was due until July 1, 1971, which is within the six-year (limitations) period." After considering the evidence adduced at trial, the Court determined that, as a matter of law, this was the point at which the fraud reasonably should have become apparent and the point at which the limitations period began to run. The defendants have made no arguments which the Court did not consider in its prior rulings on this matter and therefore, for the reasons already stated, the motions for judgment n.o.v. and for new trial

based on the statue of limitations are denied.

The final ground asserted for a new trial is that the defendants were prejudiced by the admission of certain testimony regarding the current value of Upjohn HealthCare Services and that this prejudice was not cured by a later instruction to the jury to disregard the testimony. The Court finds this argument to be without merit.

The defendants argue that this testimony created an impression that the plaintiff had been underpaid for his share of Homemakers-Illinois. Presumably, this would have increased the award of damages. The Court, however, is of the opinion that the defendants have not made any showing of prejudice because of this testimony.

First, the Court assumes that the jury followed the instructions given to it, see, e.g., *Parker v. Randolph*, 442 U.S. 62, 73 (1979), including the instruction to disregard this testimony. Second, the Court believes that the amount of damages awarded by the jury "was *clearly* within 'the maximum limit of a reasonable range.' " *Smith v. John Swafford Furniture Co.*, 614 F.2d 552, 553 (6th Cir. 1980) (emphasis in original). This is particularly true in light of the fact that the defendants chose to present no evidence relating to the value of the plaintiff's share of Homemaker-Illinois.

For all of the above reasons, the defendants' motion for judgment n.o.v. and/or new trial is denied.

Dated: April 11, 1984 /S/
BENJAMIN F. GIBSON
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD J. WILSMANN,

Plaintiff,

v. File No. K77-317 CA

UPJOHN COMPANY, et al.,

Defendants. ORDER

_____/

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 11th day of April, 1984.

PRESENT: HONORABLE BENJAMIN F. GIBSON
DISTRICT JUDGE

In accordance with the Opinion dated April 11, 1984, IT IS HEREBY ORDERED that the defendants' motion for judgment not withstanding verdict and/or new trial is denied.

IT IS SO ORDERED.

/S/
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

Entered 4-12-84

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD J. WILSMANN,
Plaintiff,

v. File No. K77-317 CA4

THE UPJOHN COMPANY, and
HOMEMAKERS, INC.,
foreign corporations
Defendants. JUDGMENT

_____/

At a session of the Court held in and for said District and Division in the City of Grand Rapids, Michigan, this 12th day of October, 1983.

PRESENT: HONORABLE BENJAMIN F. GIBSON,
DISTRICT JUDGE

This action came on for trial before the Court and a jury, The Honorable Benjamin F. Gibson, United States District Judge presiding, and the issues having been duly tried and the jury having duly rendered its verdict as to Count I on fraud;

IT IS THEREFORE ORDERED and ADJUDGED that the plaintiff, EDWARD J. WILSMANN, recover of the defendants, THE UPJOHN COMPANY and HOMEMAKERS, INC., the sum of One Million Five Hundred Seventy Eight Thousand One Hundred and Seven and no/100 ($1,578,107.00) Dollars; plus interest compounded annually (a) at the rate of six percent (6%) per annum from June 27, 1977, to May 31, 1980 and (b) at the rate of twelve percent (12%) per annum from June 1, 1980, to date of Judgment; plus his costs of action to be taxed; plus interest at the statutory rate after the date of Judgment.

IT IS SO ORDERED.

/S/
Benjamin F. Gibson
U.S. District Judge

Entered Oct 12, 1983

Entered June 20, 1983

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD J. WILSMANN
Plaintiff,

v. File No. K77-317 CA4

THE UPJOHN COMPANY, and
HOMEMAKERS, INC.,
foreign corporations
Defendants.

ORAL MOTION FOR
DIRECTED VERDICT

MR. HOLKEBOER: Your Honor, the Defendants are moving at this time for directed verdict as allowed by the Federal Rules of Procedure 50 (8-A). The directed verdict is proper when in viewing "the evidence in the light most favorable to the party against whom the motion is made there is a complete absence of pleading or proof of an issue or issues material to the cause of action or there are no contraverted issues of fact upon which reasonable men could differ." From *Grim v. Leinart*, Appellate Number 81-5737 from the 6th Circuit, filed April 19, 1983, and their quoting a case entitled Rockwell, which is found at 688F(831). "Standard to be applied in ruling on a motion for direct verdict is when the evidence is such without weighing the testimony of the witness are considering the weight of the evidence that there is substantial evidence from which the jury could find in favor of the party against whom the motion is made.

Caufme v. Mully Narfotis,

also 6th Circuit, as to the State law claims. "State law controls as to whether there was sufficient evidence presented to withstand motion for direct verdict," and it quotes from *Garrison v. Jervis B. Webb Company*, 583F(258-261), also a 6th Circuit opinion. "In Michigan the proper test for determining whether the motion should be granted is whether or not evidence was offered upon which reasonable minds would differ." *Armstrong v. LeBlanc*, 395, Mich. 526.

Your Honor, Count I of the Plaintiff's Complaint is a claim on the Federal Securities Act for fraud in violation of 10B5. Plaintiff has alleged in his complaint a series of material false inducements

which he relied on in entering this acquisition by Upjohn. Those material inducements which he claims are that the Upjohn's detailment would be made available to Upjohn and Homemakers, and that this would be a profitable venture. Two, that interest on money loaned by Upjohn to Upjohn Homemakers would not be a significant factor in executing that income for purposes of Plaintiff's incentive employment bonus.

Three, that Plaintiff was promised a minimum payment and that the employment contract would be extended until the bonus equaled this minimum payment.

Four, that Upjohn Homemakers would have its own in-house finance.

Five, that the merger would be a type B tax-free exchange.

Six, that net earnings for the purpose of Plaintiff's incentive employment bonus were to be determined in a reasonable and good faith manner, and seven, that Plaintiff would receive customary Upjohn employment benefits as provided in the contract, and Plaintiff alleges that these benefits were denied to him because Upjohn calculated his seniority date from the date of the merger rather than this date of initial employment from Homemakers.

Defendants are moving at this time for directed verdict on the basis of two reviewed legal arguments, and arguments based on the facts developed in trial.

First, we are renewing our argument that Statutes of Limitation in this case would bar Plaintiff's securities fraud claim. As discussed by this Court in the Campbell decision, general rule is that a limitation period begins to run when the claimant discovers or, in the exercise of reasonable diligence, should have discovered the act constituting the alleged fraud. The statute does not await Plaintiff's leisurely discovery of the full details of the alleged scheme. Instead, once he has or ought to have knowledge of the fact from which wrong doing could reasonably be inferred, he must attempt to get at the whole truth. Reasonable diligence is an objective standard that requires behavior of the sort expected of the well-known reasonably prudent person.

WILSMANN v UPJOHN CO. File No. K77-317 CA4

Entered June 20, 1983.

In this case, Defendants must show that the Plaintiff knew or should have known before June, 1971 of the fact that would have put a reasonable person in Plaintiff's position on notice of the possibility of fraud and second, to investigate further. The Plaintiff's own testimony in this case that he knew in 1969, prior to the closing, that the transaction would not be the type B merger, which he alleges had been promised to him, but that it would occur in another form. Any change tax consequence of this, if there were any, were known at that time. Further, he knew in November of 1969 that Scott Campbel, another shareholder who had also been promised employment with the future payment based on net earnings or based on a guaranteed amount, had not been hired by Upjohn.

As to Scott Campbell's employment, the Court ruled that that testimony regarding that may be relevant as to scienter, and that in that form it did come into this case. Plaintiff was certainly aware in November of 1969 that he did not receive an employment agreement. These facts would have sent a reasonable person to investigate the circumstances of the acquisition and to seek assurance about his arrangement with Upjohn at that time, well before June of 1971. Thus, Plaintiff does not come within the Statute of Limitations.

Secondly, Defendants would also like to renew its position for the record that this transaction does not come under the Security Exchange Act 934 under the sale of business exception to the definition of securities as to the two arguments based on the facts as developed at trial.

Plaintiff alleged material misrepresentation which induced him to enter this transaction with Defendants. He has offered no evidence regarding two of those inducements, those being the in-house financing company or the customary employee benefits. Three of the other inducements relate only to arguments that Plaintiff's bonus under the employment contract was not properly calculated. That argument being that the 21.6 percent of the net earnings should have yielded him some bonus. Those inducements are that there would not be a significant interest charged to Homemakers — Upjohn Homemakers in the calculation of his bonus, that the use of detail men would boost gross sales of the company, therefore, hopefully increasing his bonus payment and that there would be good faith calculation of the bonus.

WILSMANN v UPJOHN CO. File No. K77-317 CA4
Entered June 20, 1983

As developed in this trial before the Court, however, Plaintiff's proof is done to attack the calculation of that payment. His entire fraud case is that the guaranteed payment was fraudulently promised. While Plaintiff's testimony regarding a change from B to A, or the interest charge or the detail men may be admissible as to scienter, there is not sufficient testimony to bring a claim for fraud to the jury on those representations.

Defendants ask the Court to direct a verdict as to each of the pled material inducements except the alleged promise for a guaranteed payment for a stipulated amount.

Finally, as to that claim which they have brought before the Court, the fraud claim based on this alleged promise of a future payment, Defendants move for directed verdict on this promise on the ground that no evidence has been offered on the element of reliance. Plaintiff must establish that he relied on that allegedly false misrepresentation and decided to enter into the transaction.

Unlike intent, which is in the state of the mind of the Defendant and can be inferred and rightfully can be inferred from the actions of the Defendant, the reliance of Plaintiff is in a state of mind of the plaintiff, yet my recollection is that the Plaintiff has never testified, but for the promise for Upjohn, he would not have sold his Homemakers' stock. He may believe this, but I don't believe that the proofs have demonstrated that he was asked that question. His lack of proof of an element of 10B5 action is fatal and directed verdict should be granted.

Entered June 21, 1983.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD J. WILSMANN
Plaintiff,

v.

File No. K77-317 CA4

THE UPJOHN COMPANY, and
HOMEMAKERS, INC.,
foreign corporations
Defendants.

ORDER DENYING DEFENDANTS MOTION FOR DIRECTED VERDICT

THE COURT: The Defendants have moved for a motion for a directed verdict pursuant to provisions of Federal Rules of Civil Procedure 50 (a). It's undisputed that in order for a court to grant a motion for directed verdict that Court first of all must view the evidence most favorably toward the party who is opposing the motion. In this case the party opposing the motion is the Plaintiff. So the Court must construe that evidence most favorably toward the Plaintiff.

It's also undisputed in deciding a motion for directed verdict at this stage the Court does not weigh the credibility of the witnesses.

In the final analysis if the court concludes that there is sufficient evidence from which a jury could reasonably find by a preponderance of the evidence for the Plaintiff then the motion for directed verdict should be denied.

Conversely if there is not sufficient evidence from which a jury could reasonably find by a preponderance of the evidence for the Plaintiff, then the motion for directed verdict should be granted.

In this particular case both Mr. Wilsmann and Mr. Campbell have testified regarding the essentials of the so-called back end payment. That is to say, that they have both testified that the back end payment was in effect guaranteed by representations of Upjohn. Whether or not that is true involves a question of credibility for the jury to decide. But, based on the evidence at this point the Court must consider that evidence as true.

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In that light with reference to the allegation set forth in Count One, which is a violation of Rule 10b5 of the Securities Act in that count the Plaintiff claims certain misrepresentations or false promises made to the Plaintiff by Upjohn and/or it's representatives in order to induce the Plaintiff to agree to the merger. Among the representations allegedly made was the represenation that the employment agreement would be extended until such time as the back end payment could be secured.

There are other alleged misrepresentations made by the representatives of Upjohn testified to by the Plaintiff and others. The Court is of the opinion based upon the record as it stands now that there is sufficient evidence from which a jury could find by a preponderance of the evidence for the Plaintiff on the allegations set forth in Count One and therefore, the motion to dismiss the allegation set forth in Count One is denied.

Entered June 22, 1983.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD J. WILSMANN
Plaintiff,

v. File No. K77-317 CA4

THE UPJOHN COMPANY, and
HOMEMAKERS, INC.,
foreign corporations
Defendants.

ORAL MOTION TO
RENEW DIRECTED
VERDICT AND ORDER
DENYING MOTION

MR. HOLKEBOER: Just one brief thing. In order to preserve our motion for directed verdict, I would just like to state for the record that — restate for record those motions at this time.

THE COURT: The Court will consider that the arguments that you made previously regarding the motions to dismiss and/or for directed verdict are preserved.

MR. HOLKEBOER: Thank you.

THE COURT: And you need not make any further argument on those motions.

MR. HOLKEBOER: Thank you. We have nothing further.

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict.

(a) MOTION FOR DIRECTED VERDICT: WHEN MADE; EFFECT. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the Court granting a motion for a directed verdict is effective without any assent of the jury.

(b) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) SAME: CONDITIONAL RULINGS ON GRANT OF MOTION.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted,

the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) SAME: DENIAL OF MOTION. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.